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In the Supreme Court of the United States.

OCTOBER TERM, 1915.

EX PARTE THE UNITED STATES, *Petitioner.*
NO. 12, ORIGINAL.

BRIEF FOR THE UNITED STATES.

STATEMENT.

On March 5, 1915, James J. Henehan was indicted in the United States District Court for the Northern District of Ohio, Western Division, for violation of section 5209, R. S., by embezzling moneys of the Second National Bank of Toledo while he was its assistant cashier and head paying teller, in the sum of three thousand dollars on June 13, 1914, and the further sum of seventeen hundred dollars on July 30, 1914; and by making various false entries in the books of the bank to conceal these embezzlements. (Exhibit A to petition, pp. 28–33.)

On March 15, 1915, he plead guilty, and was forthwith sentenced to—

> be imprisoned * * * at Leavenworth, Kansas, for a period of five years, and that he pay the costs of prosecution, etc. (Exhibit A, *supra*, p. 34.)

On the same day, though—

> there were no proceedings pending for a review of the said judgment and nothing requiring further action by the court * * * was necessary before the said judgment should become final. (Exhibit A, *supra*, pp. 36–40.)

the court made a separate order *on defendant's application*——

> that the execution of the sentence be, and it is hereby suspended *during the good behavior of the defendant*, and for the purpose of this case this term of this court is kept open for five years. (Exhibit A, *supra*, p. 34.)

The Government moved to vacate this order as being beyond the power of the court. On April 9th its motion was overruled. On the same day it filed with the clerk of the court a præcipe for a commitment which the clerk refused to issue. Forthwith, on such refusal, the Government moved the court for an order requiring the clerk to issue such commitment. This motion was by the court denied. The Government duly excepted to those several orders of the court. (Exhibit A, *supra*, pp. 34–41.)

As a result Henehan, though sentenced and unpardoned, is at large. The Government in this proceeding challenges the validity of this order suspending sentence and extending the term, and denies the power of the court to make it.

As to so much of the order as relates to suspension, it insists—

(1) THAT THE ABATEMENT, SUSPENSION, OR MODIFICATION OF A PUNISHMENT ONCE ADJUDGED IS

AN EXERCISE OF EXECUTIVE POWER (THE PARDONING POWER) WHICH THE JUDICIARY MAY NOT USURP, AND INCIDENTALLY THAT SUCH A POWER NEITHER INHERED IN, NOR WAS EVER RECOGNIZED AS BELONGING TO, ANY COURT; AND

(2) THAT CONGRESS NEVER ATTEMPTED TO BESTOW IT UPON THE DISTRICT COURTS OF THE UNITED STATES.

AS TO THE TERM CONTINUANCE FEATURE IT INSISTS THAT ANY EXISTING TERM OF ANY FEDERAL COURT, IF NOT SOONER TERMINATED BY FINAL ADJOURNMENT, IS AUTOMATICALLY TERMINATED BY THE ARRIVAL OF THE DAY APPOINTED BY STATUTE FOR THE COMMENCEMENT OF A NEW TERM OF THE SAME COURT AT THE SAME PLACE.

ARGUMENT.

I.

THE FUNDAMENTAL PURPOSE OF EXERCISING JUDICIAL POWER IS TO ACCOMPLISH THE FINAL RESOLUTION OF CASES AND CONTROVERSIES—NOT THE INDEFINITE POSTPONEMENT OR SUSPENSION OF EITHER.

1. Jurisdiction, i. e., judicial power is the power to fully administer the law.

The author in 2 *Bouvier's Law Dictionary*, p. 57 (1897), defines jurisdiction as—

> The authority by which judicial officers take cognizance of and *decide* causes. 60 Vt. 618. The power to hear and *determine* a cause. 3 Ohio 494; 6 Pet. 709; 2 How. 388. The right of a judge to *pronounce a sentence of the law*, on a case or issue before him, acquired through due process of law. It *includes power to enforce* the *execution of what is decreed*. 9 Johns. 239; 3 Metc. (Mass.) 460; Thach. 202.

Brown on Jurisdiction terms it "the power to *adjudge* concerning the general question involved" (sec. 3, p. 15); "the power to judicially *administer the law*" (sec. 12, p. 54). See also sec. 13, p. 60.

2. All the judicial power of the Federal district courts and of the judges thereof must be traced to acts of Congress passed pursuant to the Constitution.

Federal courts derive their powers (save those presently to be considered that inhere in the very definition of a court) from the Constitution and acts of Congress. On this subject, Brown on Jurisdiction, sec. 12, pp. 54–55, says:

> * * * *A court has no authority to do an act unless expressly or impliedly authorized* by the supreme power of the State; the word "State" applies to the Nation as well as the States that compose it * * * and the *statutes* prescribe the manner in which the court shall be conducted * * * as well as the method or rules of *procedure governing them.* There are *no courts* in *this country except those so created.*

See also *Cooper* v. *Reynolds*, 10 Wall. 308, 316.

In *Martin* v. *Hunter*, 1 Wheat. (U. S.) 328, the court said:

> Such is the language of the article (III) *creating* and *defining* the judicial power of the United States.

In *Ex parte Vallandigham*, 1 Wall. 243, 249, 250, the court said:

> The courts of the United States *derive authority* to issue such a writ from the *Consti-*

> *tution* and the *legislation of Congress.* To place the two sources of the right * * * in obvious contrast * * * we will cite so much of the third article of the Constitution as we think will best illustrate the subject: "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish." "The judicial power shall extend to all *cases* in law and equity arising under the Constitution and laws of the United States," etc.

3. That power is also a power to administer law.

Section 2 of Art. III, *supra*, limits "the judicial power" to "*cases*" and "*controversies*," the former word comprehending both civil and criminal matters. *Chisolm* v. *Georgia*, 2 Dallas 419, 431; *Tennessee* v. *Union & Planters Bank*, 152 U. S. 459; Garland and Ralston, "*United States Courts*," p. 7.

In the *Tennessee* case, *supra*, it is said:

> The third article of the Constitution, said Chief Justice Marshall, enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws and treaties of the United States, *when any question respecting them shall assume such a form that the judicial power is capable of acting on it.* The *power is capable of acting only* when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a *case*, etc. (459.)

The oath taken by every Federal judge is to "*administer* justice." (Sec. 712, R. S.)

The excerpts from Federal statutes quoted in the note below reenforce this idea.[1]

---

[1] Sec. 587, R. S.: "and thereupon the Circuit Court shall proceed to *hear* and *determine*," etc.

Sec. 615, R. S.: "and said court shall take cognizance of, and proceed to *hear* and *determine* the case," etc.

Sec. 645, R. S. (35 Jud. Code): "and thereupon such proceeding, trial, and *judgment* may be had," etc.

Sec. 655, R. S.: "to be transferred for trial or *determination* to the other of said circuit courts."

Sec. 737, R. S. (50 Jud. Code): "the court may * * * proceed to the trial and adjudication of the suit," etc.

Sec. 742, R. S. (55 Jud. Code): "and the court shall have jurisdiction to *hear* and *decide it* and to *cause mesne* or *final process to be issued and executed*," etc.

Sec. 746, R. S. (8 Jud. Code): "and the court may proceed therein and *bring* it *to a conclusion*."

Sec. 974, R. S.: "and *on every conviction* for any other offense not capital the court may * * * *award* that the defendant shall pay the costs," etc.

Sec. 1026, R. S.: "in every case * * * where * * * the demurrer is overruled, *the judgment shall be* respondeat ouster," etc.

Sec. 1032, R. S.: "and when the party pleads not guilty * * * the *cause shall, without further* form or ceremony, *be tried* by a jury."

Sec. 1036, R. S.: "they (the jury) may render a verdict in regard to those as to whom they do agree, *on which a judgment shall be entered accordingly*."

Sec. 1987, R. S.: "and to be recoverable from the defendant as *part of the judgment in case of conviction*."

Sec. 300, Jud. Code (36 Stat. 1087): "all offenses committed * * * prior to the taking effect hereof * * * may be *prosecuted and punished* * * * in the district courts in the same manner as if this act had not been passed."

Sec. 290, Jud. Code: "all suits * * * shall thereupon and thereafter be proceeded with and *disposed of*," etc.

Sec. 54, Penal Code (35 Stat. 1088): "Fines collected shall be paid into the public school fund," etc.

4. The law can not be said to have been completely administered until the court has accomplished the execution of the sentence, i. e., the punishment prescribed by law.

Bouvier says (*supra*), "It (the judicial power) includes power to enforce the execution of what is decreed." Brown on Jurisdiction says, "It ordinarily may enforce its judgment * * * by execution." (Sec. 13, p. 60.) And again, "The jurisdiction of a court is not exhausted by the rendition of its judgment, *but continues until the judgment is satisfied.*" (Sec. 3a, p. 21.)

No one would seriously urge that a court had the power in any civil case to indefinitely suspend either the rendition or the execution of a judgment; and yet the source of Federal judicial power and the purpose of its exercise are the same in all cases, *civil as well as criminal.*

Sec. 213, Pen. Code: "any person violating any provision of this section may be tried and *punished*," etc.

Sec. 281, Pen. Code: "when a person is convicted * * * the court may, in its discretion, direct that the amount of the fine * * * be paid," etc.

Sec. 311, Pen. Code: "except as otherwise expressly provided, the offenses defined in this chapter *shall be punished* as hereafter provided."

Sec. 329, Pen. Code: "shall have jurisdiction to hear, *try and determine* * * *. Any person *convicted* * * * *shall be subject to the same punishment.*"

Sec. 331, Pen. Code: "the court before which any person is convicted of murder * * * may, in its discretion, *add to the judgment* of death," etc.

Sec. 333, Pen. Code prescribed punishment demanded in the case of an accessary after the fact.

5. Federal statutes punishing crime are unconditionally mandatory save for the maximum and minimum of punishment fixed in each statute.

The general phrasing of the various sections of the Penal Code defining crime is "whoever shall [then follows a definition of the criminal act] * * * shall be punished," or "shall be imprisoned," or "shall be fined," or "shall be fined and imprisoned," or "shall be fined or imprisoned, or both;" while occasionally there appears "whoever shall violate," or "whoever is convicted of," or "upon conviction thereof" "shall be punished" or "imprisoned," etc. (Secs. 2, 122, 175, Penal Code; sec. 5344, R. S.) That these prescribed punishments are meant to limit the court's power is evidenced by sec. 338 of the Penal Code, which reads:

> SECTION 338. The omission of the words "hard labor" from the provisions prescribing the punishment in the various sections of this act shall not be construed as depriving the court of the power to impose hard labor *as a part of the punishment*, in any case *where such power now exists.*

Mindful that every Federal statute defining crime declares that the criminal actor shall be punished in a certain prescribed way, and allows latitude to a court or judge only as between the maximum and minimum punishment prescribed by the statute itself, can it be that a district judge, on the theory of some reserved power in his court or office, may order that the convicted person shall not be so punished? If so, we must

read into each of these sections a proviso, in substance, "unless the trial judge shall decide otherwise." And if he may suspend imposition or execution of sentence upon the reserved power in *minor* offenses, equally may he do so in cases of *murder, treason,* and the *graver* felonies. In the event this power does inhere, Congress should simply provide that the punishment for all crime shall be such, if any, as the trial judge shall direct. If it lies in the power of the judge to stop the administration of the criminal law short of the application of punishment, having made up his mind that a particular defendant ought not to be punished, why go through the idle formality of a jury trial? Rather, upon the return of the indictment, or any time after he reaches the conclusion that there ought to be no punishment, let him suspend all further proceedings against the accused during his good behavior, or for such arbitrary period as shall seem to the court appropriate.

II.

UNDER OUR SCHEME OF GOVERNMENT THE PARDONING POWER, WHICH INCLUDES REPRIEVE AND COMMUTATION, IS AN EXCLUSIVE FUNCTION OF THE EXECUTIVE BRANCH, NOT TO BE ENJOYED BY THE JUDICIARY.

In *United States* v. *Mid-West Oil Co.*, 236 U. S. 459, 511, this court said:

> It is one of the great functions of this court to keep * * * each branch of the Government within the sphere of its legitimate action, and prevent encroachment of one branch upon the authority of another.

In *United States* v. *Klein*, 13 Wall. 128, 147, of an act of Congress attempting to require the courts to declare the force of a pardon, this court said:

> It is the intention of the Constitution that each of the great coordinate departments of the Government * * * shall be in its sphere independent of the others. To the executive alone is entrusted the power of pardon. * * *. Pardon includes amnesty * * *. It may be granted on conditions.

See also *Ex parte William Wells*, 18 How. 307, 310, 311, 314; *Ex parte Garland*, 4 Wall. 333.

This feature will be further exploited in the analysis of authorities in IV, *infra*.

III.

CONGRESS HAS NEVER ATTEMPTED TO BESTOW SUCH A POWER ON EITHER THE DISTRICT COURTS OR THEIR JUDGES.

1. Conceding, for the moment only, that Congress might constitutionally give this power of *indefinite* suspension, as distinguished from a mere parole, it has never yet undertaken to bestow it on district courts or judges either in express terms or by necessary implication. On the contrary, while it has bestowed a restricted power of parole on judges within the District of Columbia (36 Stat., 864), it has hitherto refused to pass any bill lodging a like power of parole in district judges generally. (S. 3798, 61st Cong., 2d sess. Introduced 12–10–1909; H. R. 20974, 63d Cong., 3d sess.

Introduced Jan., 1915.) The function assumed by respondent here is broader than that exercised in parole as limited in the measures before Congress. Having refused to grant this lesser power, it can not be assumed that it would grant the greater. If it had ever meant to try to lodge so large a power in Federal courts or judges it would have used no uncertain language in that regard.

2. It has provided for a stay of execution in specific instances only, by section 988, R. S.,[1] which section is made applicable to fines and penalties in criminal cases by section 1041, R. S.

Section 1040, R. S., provides:

> Whenever a judgment of death is rendered * * * and the case is carried to the Supreme Court * * * the court rendering such judgment shall * * * postpone the execution thereof from time to time and from term to term, until the mandate of the Supreme Court in the case is received and entered upon the records of such lower court. In case of affirmance by the Supreme Court, the court rendering the original judgment *shall appoint a day* for *the execution thereof;* and in case of reversal, such further proceedings shall be had in the lower court as the Supreme Court may direct.

[1] Section 988, R. S.: "In any State where judgments are liens upon the property of the defendant, and where, by the laws of such State, defendants are entitled, in the courts thereof, to a stay of execution for one term or more, defendants in actions in the courts of the United States, held therein, shall be entitled to a stay of execution for one term."

Congress has also provided methods of avoiding indefinite imprisonment for fines and costs (sections 1042 and 5296, R. S.); and it has expressly recognized three judicial proceedings as of right—but three only—available to a defendant after verdict of guilty to defeat the execution of a criminal sentence. These are a motion for new trial, a motion in arrest of judgment, and a writ of error. Secs. 670, 726, R. S., and sec. 128, Judicial Code (36 Stat. 1133). Otherwise, as evidenced by the various Federal statutes, *supra*, Congress has plainly indicated that sentence must be *promptly pronounced* and *executed* upon a verdict or plea of guilty.

3. We now consider section 722, R. S., which reads:

> The jurisdiction in civil and criminal matters conferred on the district and circuit courts by the provisions of this title (XIII, sections 530 to 1093, incl.) and of the title "Civil Rights" (XXIV, sections 1977 to 1991, incl.) and of the title "Crimes" (LXX, sections 5323 to 5550, incl.) for the protection of all persons in the United States in their civil rights and for their vindication *shall be exercised and enforced in conformity with the laws of the United States*, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object or are deficient in the provisions necessary to furnish suitable remedies and *punish offenses* against the law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is

> held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and *disposition of the cause;* and, *if it is of a criminal nature, in the infliction of punishment on the party found guilty.*

Of the sections referred to, sections 563, 629, and 711, R. S., give to one or the other—the district or circuit courts—complete jurisdiction; i. e., power to hear, determine, and punish "all crimes and offenses cognizable under authority of the United States." This jurisdiction has all passed to the present district courts. (Subd. 2, sec. 24, Jud. Code, 36 Stat. 1091.)

Although in terms limited to the vindication of "civil rights" (*Tennessee* v. *Union and Planters Bank*, 152 U. S. 463, 468), the broad definition of "civil rights" in sections 1877 to 1991, R. S., makes it clear that, in the sense of this statute, they are to be vindicated in part by criminal prosecutions and punishments, *Boyd* v. *United States*, 116 U. S. 616, 630; *I. C. C.* v. *Brimson*, 154 U. S. 479. By it Congress, in effect, has said that the judicial power to prosecute and punish for crime "shall be exercised and enforced in conformity with the laws of the United States so far as such laws are suitable" to *accomplish such prosecution and punishment.* If a court or its judge purposes to punish the convicted or confessed criminal, the Federal laws (as evidenced by the excerpts, *supra*) are not only suitable, but well-nigh compelling to that end. It is only when there is

a disposition to *avoid* inflicting punishment, after conviction or equivalent plea, that these laws seem unsuitable. They are not deficient *for punishment*, but are hostile to its indefinite suspension. No more positive declaration of power can be framed than the phrase running through all the Federal criminal statutes, "whoever (is convicted) shall be punished," etc.

Apt indeed in this regard is the following language of Blatchford, J., in *In re Joseph Stupp*, 12 Blatchf. 501, 508, 509:

> Nor is there anything in the provisions of section 722 of the Revised Statutes which requires any different rule to be applied to the decision of the present case from that which would have been applicable in the absence of that enactment. * * * But section 722 manifestly has reference not to the extent or scope of jurisdiction or to the rules of decision, but to the forms of process and remedy. The laws of the United States are fully suitable to carry into effect the jurisdiction of this court in this case, *and they are adapted to the object of such jurisdiction, and they are not deficient in any provision necessary to furnish suitable remedies to exercise and enforce such jurisdiction.*

Of course, as to details of procedure such, for example, as whether the defendant shall be present or absent at the time of sentence, and the method of issuing and delivering process for its enforcement, the Federal statutes may be silent; and if so, refer-

ence could be had to the common law as modified (*Crowley* v. *United States*, 194 U. S. 461, 467; *United States* v. *Mitchell*, 136 Fed. 896, 909–910; *United States* v. *Eagan*, 30 Fed. 608; *Brown* v. *Bonding Co.*, 210 Fed. 844, 848). But on the question of power and duty to accomplish punishment they speak in thunder tones.

Even were this section (722) applicable to a question of power, there is no occasion to consider its final alternative, because that is only operative in the event the Federal laws "are not adapted to" or "are deficient in the provisions necessary to punish offenses."

Assuming, however, that it compelled a resort to "the common law as modified," etc., this could *only* be to find rules "to govern said court in the trial and *disposition* of the cause and * * * *in the infliction of punishment on the party found guilty.*" To resort thereto for rules to enable the court to *avoid* inflicting punishment on the party found guilty would be to fly in the very teeth of section 722 and of the whole related body of Federal law. (Cases first pargr. "IV" infra).

But even if resort were to be thus had to the "common law as modified," neither it (as will be presently shown) nor any statute of Ohio has conferred any power on criminal courts or their judges to indefinitely or arbitrarily suspend the execution of criminal sentences.

IV.

THE LAW NEVER RECOGNIZED ANY INHERENT POWER IN A COURT TO SUSPEND THE EXECUTION OF A SENTENCE FOR A LONGER PERIOD THAN NECESSARY TO DETERMINE THE LEGAL PROPRIETY OF EXECUTING IT.

In the outset we must sharply distinguish capricious suspension from suspension to await the determination of some question on the event of which depends the legal propriety of enforcing the sentence. The latter, because essential to the due administration of the law, is an inherent power of every court. The former, because it opposes the will of a single judge to the positive mandate of the law, is destructive of the due administration of the law and never can be an inherent power of any court.

In *Kendall* v. *United States*, 12 Pet. 524, 613, the court said:

> To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the Constitution and entirely inadmissible.

See also *Porto Rico* v. *Rosaly*, 227 U. S. 270, 277; and *I. C. C.* v. *Brimson*, 154 U. S. 479.

A capricious suspension of the *imposition* of sentence is essentially a *nonjudicial* act, for it leaves the convict enjoying all his civil rights as well as immunity from punishment. In practical effect it can not be distinguished from a conditional pardon. By such suspension a judge who has taken a solemn oath to completely administer it blocks the due administra-

tion of the law. Though in a less degree, the same is true as to capricious suspension of *execution*. Each, in effect, involves an exercise of the pardoning power; for while civil rights are not preserved or restored by a suspension of *execution*, no more are they by a commutation of sentence by the President. Of course, if a judge (after sentence and commitment) were to grant a parole under authority of some valid act of Congress, he would then be enforcing the law, because the parole would be a statutory element of every punishment.

This court has frequently intimated that it does not consider it an inherent power of Federal courts to capriciously stay proceedings upon their judgments or sentences.

In *Ex parte Gordon*, 1 Black, 503, 505, it said:

> The Circuit Court itself has not now the power to recall it (a death warrant).

In *United States* v. *Mayer*, 235 U. S. 55, 70, this Court said:

> The judgment was subject to review in the appellate court, but so far as the trial court was concerned it was a finality. The subsequent proceedings was in effect a new proceeding, which, by reason of its character, invoked an authority not possessed.

ANALYSIS OF AUTHORITIES.

In a note in 12 *Columbia Law Review*, p. 543 (1912), it is said:

> *The inherent power of criminal courts to control their sentences.*—In early times, when there

were no writs of error or appeals in criminal cases, the courts found it necessary to exercise rather broad control over their sentences. Thus they frequently postponed the rendering of sentence for a short and definite time, to enable the prisoner to apply to the executive for pardon. *They also asserted the right to suspend for a reasonable period the execution of a sentence which had already been rendered, in order to permit an inquiry into the sanity or pregnancy of the accused. At this point the early courts stopped, no further exception being recognized to the general rule that sentence must be imposed immediately upon conviction and, when rendered, executed with dispatch.*

The necessity for invoking the exercise of the inherent power to suspend sentence temporarily has now largely disappeared because the modern reforms of criminal procedure have made adequate provision for the review of criminal causes. Nevertheless, this power still exists, and in some jurisdictions it has been extended beyond its former scope and applied to purposes foreign to those which historically have justified its existence. Thus in the recent case of *Gehrmann* v. *Osborne* (N. J. 1912), 82 Atl. 424, the court employed it as a disciplinary measure by suspending sentence indefinitely, and putting the accused upon probation with the sentence hanging over his head. This practice is generally upheld on the theory that the power to determine when sentence shall begin includes the power to withhold it indefinitely upon condition. *This claim, however, lacks historical justification, and such suspension is a pure usurpation, the*

anomalous character of which is frequently recognized. The objections to such a practice are almost elementary: The fate of a guilty criminal should not be left indefinitely in the hands of the judge who tried the cause; the State is entitled to have sentence pronounced; and there is always recourse to the executive for pardon.

An attempt has also been made to apply a similar extension to the other form of early judicial control *in cases where the court, having rendered its sentence, seeks to suspend the execution indefinitely during the good behavior of the accused.* The inherent power to stay execution temporarily to allow an appeal or for other reasonable ends is everywhere recognized. *When, however, this power is used for probationary purposes the courts are practically unanimous in holding its exercise invalid and an infringement upon the pardoning power of the executive.* * * *

This court has expressed itself on the change accomplished in criminal procedure. *Garland* v. *Washington*, 232 U. S. 646.

In *Pointer* v. *United States*, 151 U. S. 396, 420, the question "whether a court of the United States, in the absence of authority conferred by statute, has the power, after passing sentence in a criminal case, to suspend its execution indefinitely, and until the court in its discretion removes such suspension," was suggested but not decided, the court holding that "a decision of that question is not necessary to the disposition of this case upon its merits."

Within certain limitations the power admittedly inheres. Sentence does not deprive a convict of his right of review or his sanity may be questioned. Here, until the question is resolved, stay is appropriate and may be essential. But save in case of juveniles, etc., and under specific statutes, courts are not the perpetual guardians of the sentenced.

In *United States* v. *Wilson*, 46 Fed. 748 (C. C. Dist. Idaho), the question was whether a district court of Idaho Territory, after suspending the pronouncement of sentence "until further orders of this court," could at a subsequent term revoke such order of suspension and sentence the defendant. The court said (p. 749):

> * * * There can be no doubt of the right of a court to temporarily suspend its judgment, and continue to do so from time to time in a criminal cause, for the purpose of hearing and determining motions and other proceedings which may occur after verdict, and which may properly be considered before judgment, or for other good cause. In this cause, however, the record does not show that the suspension was for any such reason, *or for a certain or short time*, but, on the contrary, it *appears it was for such uncertain time as the defendant should continue to remain so favorably impressed with the laws of the land as to obey them.* Instead of this being a mere suspension of sentence, *it operated as a condonation of the offense, and an exercise of a pardoning power, which was never conferred upon the court. In this I think the court clearly transcended its authority.*

In an unreported decision (*In re James Adams, alias James Allen*) by the United States District Court of Kansas, First Division (Oct. 29, 1914), the power to suspend the execution of the sentence was unequivocally denied. Defendant, seeking "habeas corpus," claimed that a commitment issued nine months after his conviction, upon a sentence of imprisonment "suspended during the good behavior of said defendant," was illegal. The court said:

> While it is usual to delay sentence after conviction until a motion for a new trial or in arrest of judgment, and while appeals are pending and undisposed of, or for any other good and sufficient cause, sentence is withheld; yet *when a sentence has been pronounced by the court its operation begins at once.* The court may, however, before the term adjourns change, correct, or increase or diminish a sentence of imprisonment, but this power does not extend beyond the term.
>
> In this case it was attempted to *hang a sentence of five years' imprisonment in the penitentiary over the* head of the petitioner *to be executed at such time as* the district attorney or *the judge might see fit. This can not be done.* This would leave the defendant in a very uncertain situation. *He would be unable to tell for an indefinite period whether he was a free man or a convict, and while the sentence in terms might be for five years' imprisonment, it would be in effect far more severe, because of the uncertainty as to the time of its execution. Such a sentence is wholy unauthorized by law.* The commitment issued thereon is illegal and does not

justify the imprisonment of the petitioner. *State* v. *Abbott*, 70 S. E. 6, 35 L. R. A. n. s. 112; *In re Clendenning*, 97 Pac. 650, 19 L. R. A. n. s. 1041; *United States* v. *Wilson*, 46 Fed. 748.

In *Fuller* v. *State* (1912), 57 So. 6–8, the court having "ordered that the jail sentence be suspended during the good behavior of the defendant," several months thereafter the court ordered him committed to serve the suspended sentence. The Supreme Court, at the *first* hearing, declared (p. 7): "We think there can be no doubt that the power to suspend sentence after conviction is inherent in courts." Upon a rehearing, 57 So. 806, 807, the court *reversed* its earlier decision (100 Miss. 81), and said:

> SMITH, *J.* Appellant suggests that we have confused the question of a court's power to suspend the imposition of a sentence with the question of its power to suspend the execution of a sentence after it has been imposed. As the first question is not involved herein, we will pretermit any discussion thereof and confine ourselves to the latter; that is, the power of a court to suspend the execution of a sentence after it has been imposed.
>
> Power to suspend the execution of its sentence has not been conferred upon any court in this State by our Constitution or statutes, and consequently if such power exists at all it must be one of the inherent powers of courts or be derived from the common law. The inherent powers of a court are such as result from the very nature of its organization, and

are essential to its existence and protection and to the due administration of justice. *Watson* v. *Williams*, 36 Miss. 331; *In re Waugh*, 32 Wash. 50, 72 Pac. 710; 8 Am. & Eng. Ency. Law, 28; 4 Words and Phrases, 3605. It can not be said that power to suspend the execution of a sentence is essential to the existence or protection of a court, or that it is essential to the due administration of justice, and consequently it has no such inherent power.

At common law, while a judgment remained unreversed, there were only two methods by which its execution could be stayed or prevented: First, by a reprieve, which merely delayed the execution of the sentence; second, by a pardon, which operated as an absolute bar to its execution. The power to pardon was never claimed or exercised by the courts, and will not be further considered here. Reprieves were of three kinds: First, ex mandatio regis; second, ex arbitrio judicis; third, ex necessitate legis. The first and third kinds of reprieves have no relevancy here, and we may dismiss them from further consideration. Reprieves ex arbitrio judicis, or discretionary reprieves, were granted by the courts only in exceptional cases, to prevent abuses of their process, and to prevent irreparable injustice from being done to defendants. Some of the circumstances under which this power was exercised were as follows: Where the defendant pleads a pardon, which, though defective in point of form, sufficiently manifests the intention of the Crown to remit the sentence, where it seems doubtful whether

the offense is included in some general act of grace, or whether it amounts to so high a crime as that charged in the indictment. The judge sometimes also allows it before judgment, or at least intimates his intention to do so, as when he is not satisfied with the verdict and entertains doubts as to the prisoner's guilt, or when a doubt arises, if the crime be not within clergy, or when, from some favorable circumstances, he intends to recommend the prisoner to mercy. 2 Hawkins, Pleas of the Crown, 657; 2 Hale, Pleas of the Crown, 412; 1 Chitty's Crim. Law, 757; Archbold's Crim. Plead. & Prac. 206; 4 Blackstone, 394. This right of the court did not rest on any express authority or recognized principle, but stood alone on ancient usage. 2 Dyer, 205.

In Bishop's New Crim. Proceed. (4th ed.), sec. 1299, it is stated that "the law of respite or reprieve *appears* to apply alone to capital cases." In 1 Chitty's Crim. Law, 577, and Sterling v. Drake, 29 Ohio St. 457, 23 Am. Rep. 762, the statement is positive that reprieves were granted only in capital cases. As all of the early cases which have come under our observation, upholding this power of the court, were cases wherein the death penalty was imposed, it may be that the law relative thereto applies only to capital cases. It is unnecessary, however, for us to so hold here, for the reason that the power to suspend the execution of a sentence was never exercised or claimed by the courts at common law, as we have heretofore stated, except when necessary to prevent an abuse of their process or to pre-

vent irreparable injustice from being done a defendant.

It may be also, as some courts have held, that the difference between our present criminal procedure and that of the early English courts is such that it is no longer necessary or proper for the courts to grant reprieves; but it is unnecessary for us to express any opinion on this point, for the reason that the reprieve or suspension granted in the case at bar was not for the purpose of preventing an abuse of the court's process or to prevent any injustice from being done appellant, but simply that it might be held over him *in terrorem*, thereby forcing him to refrain from further acts of lawlessness and to become a more law-abiding citizen. Since the "great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offenses of the same kind," it may be that courts ought to possess the power within certain limits to suspend the execution of a sentence during good behavior; but the question before us is not what power the courts ought to have, but what their power in fact is.
* * *

We have examined all the cases called to our attention which are in real or apparent conflict with the views here expressed, and have reexamined those cited in support of our former opinion, and find that all of them are either not in point or were decided upon a misconception of the inherent powers of a court or of what the common law upon this point was. In *State* v. *Crook*, 115 N. C.760,

> 20 S. E.513, 29 L. R. A.260, which was a case involving the power of the court to suspend the imposition of a sentence and not of the execution thereof, the court, in upholding the power of the lower court so to do, frankly stated that it could find no precedent to support its decision. *We are therefore of the opinion that we erred in holding that the lower court had inherent power, or any power at all, to suspend the execution of a sentence during the good behavior of a defendant.*

In *In re Webb* (1895), 89 Wisc. 354, 62 N. W. 177, the trial court had ordered "that the sentence of imprisonment (6 mos.) be suspended until further order of the court." At a succeeding term more than 6 mos. later the court ordered defendant committed to jail. In habeas corpus proceedings the Supreme Court, ruling that defendant could not be held because his term of imprisonment had expired, said (356):

> * * * After the defendant had been convicted and the sentence of the law in legal and proper form had been pronounced against him, it is difficult to understand upon what principle the court could further interfere in the premises. The right of the court, for cause, within the exercise of a reasonable discretion, to postpone sentence or suspend sentence, as it is said, seems to be clear; but we think, both upon principle and authority, its right to suspend the execution of the sentence after it had been pronounced can not be sustained except as

> incident to a review of the case upon a writ of error or upon other well-established legal grounds. After sentence given, the matter within these limits would seem to be wholly within the hands of the executive officers of the law.
>
> * * * And the action of the court in the premises after it had regularly pronounced the punishment provided by law for the offense in question, is clearly obnoxious to the objection that it is an attempted exercise of power, not judicial, but vested in the executive.

In *Spencer* v. *State* (1911), 125 Tenn. 64, 75, 140 S. W. 597, 600, the court, after reviewing the cases dealing with this subject, said:

> The cases just referred to, indicate the general nature of the grounds on which an execution of the sentence may be postponed. The principle is that the postponement can not be made except on some ground conducive to the more perfect execution of the final process or to the safeguarding and security of the prisoner's rights in respect of the particular litigation out of which has grown the judgment or sentence on which the execution is awarded. *It can not be stayed merely for the purpose of enabling the trial judge to hold the sentence in terrorem over the head of the prisoner to secure future good behavior.*

In *People* v. *Barrett*, 202 Ill. 287 (1903), the precise question was as to the power of the court to *suspend sentence*, but the court, in its opinion, discusses gener-

ally not only that question, but also the power to stay execution thereof (p. 290):

> * * * but to suspend indefinitely the pronouncing of the sentence after conviction, or to suspend indefinitely the execution of the judgment after sentence pronounced, is not within the power of the court. To allow such a power would place the criminal at the caprice of the judge. If the judge can delay the sentence for one year, he could delay it for fifteen years, or any length of time.

On principle no such power as this can safely be entrusted to courts without such limitations as are invariably fixed when the matter is regulated by statute. The objections to such an inherent power are nowhere better stated than in the opinion of Chief Justice Cooley in *People* v. *Brown*, 54 Mich. 15, and in the dissenting opinion of Judge Champlin in *People* v. *Reilly*, 53 Mich. 260, though each case involves directly only the suspension of imposition of sentence. In the *Brown* case Chief Justice Cooley said:

> * * * they (petitioners) formally request the judge himself * * * to grasp at power not confided to him, and usurp authority in the interest of a doubly convicted offender. * * * Now it is, no doubt, competent for a criminal court, after conviction, to stay for a time its sentence; * * * but it was not a suspension of judgment of this sort that was requested or desired in this case; it was not a mere postponement; * * * in other words, what was requested of the judge was

that he should take advantage of the fact that he alone was empowered to pass sentence, and, by postponing indefinitely the performance of this duty, indirectly, but to complete effect, grant to the respondent a pardon for his crime. * * * No doubt judges have done this sometimes under the pressure of such influence as appears here, but this is no reason for asking a repetition of the wrong; it is rather a reason for being especially careful and particular not to invite it, lest by and by it come to be understood that the power to pardon, instead of being limited to one tribunal, is confided to many; and that the pressure of influence and respectability may be as properly employed with a judge to prevent sentence as many seem to think it may be with a governor to procure a formal pardon.

The language appears to be in direct conflict with the decision of the same court, in the same year, in *People* v. *Reilly* (1884), 53 Mich. 260, which is not mentioned in the Brown case. It is significant that Champlin, J., who dissented in the *Reilly* case, in a well-reasoned opinion, is found two years later delivering the opinion of the court in *People* v. *Felker* (1886), 61 Mich. 110, denying, in no uncertain terms, the power of the court to suspend sentence.

In his dissenting opinion Judge Champlin said:

If the judge entertained serious doubts of his guilt he should have recommended the governor to pardon the respondent; and if he

> entertained no serious doubts of his guilt, he should have pronounced judgment instead of setting the criminal at large upon his own recognizance. If such power can be exercised by a judge, it incorporates into our administration of the criminal law the "ticket-of-leave" system of the English judicature without its surveillance and checks, and places the criminal at the caprice of the judge, subject to be called up for sentence at any time. If the judge can delay the sentence one year, I do not see why he may not fifteen years. An exercise of such power in this age would be no less revolting to our sense of justice than was the exercise of such power in the reign of James I., when he sent Sir Walter Raleigh to the block fifteen years after his conviction.

The *Reilly* case is sometimes cited as authority for the exercise of the power to suspend sentence, but it is submitted, in view of the *Brown* and *Felker* cases, *supra*, that Michigan is not one of the jurisdictions upholding that power. Indeed, in *People* v. *Cummings*, 88 Mich. 249, a statute expressly authorizing suspended sentences was held unconstitutional as encroaching upon pardoning power of the executive.

In *Neal* v. *State* (1898), 104 Ga. 509, 30 S. E. 858, the court suspended execution of the imprisonment portion of its sentence "until further order of the court." In its opinion the court said:

> The power to indefinitely postpone the punishment prescribed by the law, whether

> exercised by suspending the imposition or by suspending the execution of a sentence, is the power to perpetually prevent punishment, a power which, under such provisions as are found in the constitution of this State, does not exist in the courts. The authorities draw a clear distinction between the suspension of a sentence and the suspension of the enforcement of a sentence; and however they may differ as to the right of a court to indefinitely postpone its judgment in a criminal case, it is well established that it can not, after the judgment is rendered, indefinitely postpone its execution. * * * Therefore *the power to indefinitely suspend its execution, either in whole or in part, would be the power to prevent the enforcement of the law and to defeat the demands of justice.* * * *

In *Ex parte Peterson*, 19 Ida. 433, 113 Pac. 729 (1911), the court said:

> The District Court has no authority, after sentencing a prisoner to a term of imprisonment, to direct his release with or without bond, making such release subject to recall by the judge or court, and thereafter require the defendant to serve out the suspended term of imprisonment. * * *

In *State* v. *Abbott* (S. C.), 70 S. E. 6 (1911), involving the suspension of execution of a sentence, the court said (p. 7):

> * * * Other courts deny that the judge of a trial court possesses such discretionary

> power to suspend sentence unless the power be conferred by statute. * * * It seems to us clear that trial courts had no such general and unlimited power at common law. * * * Attempts by courts to suspend the execution of sentence or to postpone sentence beyond what is necessary to preserve the legal rights of the convict * * * are violative of the Constitution as well as the statute law of the State.

In *Ex parte Clendenning* (1908) 22 Okla. 108, 116, the court, after reviewing the cases cited in support of the contention that a court has power to suspend the execution of a sentence and thereafter at another term to order the accused committed to serve the sentence, said:

> To supplement the cases presented to us above, we have sought diligently to find other authorities; but we have been unsuccessful. Outside of those which the Attorney General has presented to sustain this judgment, we have been unable to find a solitary well-considered opinion. Every case wherein the question is squarely presented and passed upon, and the courts have given it the care and attention its importance deserves, holds, practically without dissent, that "in passing sentence on a person convicted of an offense the court has no power to provide that the imprisonment of the defendant shall begin at some future, indefinite time, depending on the happening of an uncertain contingency," etc.

The following cases also deny the power to capriciously stay execution of sentence:

In re Strickler (1893), 51 Kans. 700.
State v. *Voss* (1890), 80 Iowa 467.
Daniel v. *Peterson* (1912), 137 Ga. 826.
Ex parte Bugg (Mo. App. 1912), 145 S. W. 831.
State v. *Murphy* (1897), 23 Nev. 390, 402.
In re Norman Markuson (1895), 5 N. Dak. 180.

The conflict of state decisions relates almost entirely to suspension of *imposition* rather than suspension of execution of sentence. Of the cases usually referred to as supporting each alleged power (*People* v. *Court of Sessions* (1894), 141 N. Y. 288; *People* v. *Weaver*, 33 Mich. 297; *People* v. *Reilly*, 33 id. 260; *State* v. *Addy*, 43 N. J. L. 114; *Gehrmann* v. *Osborne*, (N. J. Ch. 1912), 82 Atl. 424; *Sylvester* v. *State* (1899), 65 N. H. 193; *State* v. *Crook*, 115 N. C. 760; *Ex parte Williams* (1890), 26 Fla. 310; *Commonwealth* v. *Dowdican's Bail* (1874), 115 Mass. 133; *St. Helaire, Petitioner* (1906), 101 Me. 522; *People* v. *Patrick* (1897), 118 Cal. 322; *Commonwealth* v. *Dunleavy*, 16 Pa. Sup. Ct. 383; *Weber* v. *State* (1898), 58 Oh. St. 616; *State* v. *White*, 117 N. C. 806), all save the last two involve suspension of *imposition* only. Some of the cases illustrating the contrary view as to *imposition* of sentence are: *State* v. *Hockett* (1908), 129 Mo. App. 639; *Gray* v. *State* (1886), 107 Ind. 177; *People* v. *Barrett* (1903), 202 Ills. 287; *People* v. *Brown*, 54 Mich,

15; *People* v. *Felker* (1886), 61 Mich. 110; *In re Flint* (1903), 25 Utah 338; *Republic* v. *Pedro*, 11 Hawaii 287.

While criticism of cases asserting the power to suspend *imposition* is not essential here, their analysis so weakens their force on this closely related question, and indirectly so fortifies our contention that we venture to consider them.

In the first *Court of Sessions* case, *supra*, while the court said—

> 'There can, I think, be no doubt that the power to suspend sentence after conviction was inherent in all such courts at common law (292)—

the facts do not justify or demand so broad a statement. Sentence had been suspended "during good behavior." Subsequently, the Supreme Court granted a peremptory writ of mandamus commanding the Court of Sessions to sentence the defendant to the punishment prescribed by law. The sole question was as to the duty of the latter court to pass such sentence.

After the granting of the writ, in 1893, section 12 of the Penal Code, prescribing the duty of courts to pass sentence, was amended by adding the following:

> But such court may, in its discretion, suspend sentence during the good behavior of the person convicted * * *.

On page 294 the court said:

> It *is admitted* by the learned district attorney that this amendment, though passed

> since the writ in this case was directed by the order, is applicable to this case, as the defendant in the indictment has not yet been sentenced, and if brought before the court for that purpose, pursuant to the command of the writ, sentence may be suspended, if the enactment is valid.

The constitutionality of that statute was alone involved. Why had the legislature deemed it necessary to bestow this power unless there was general disbelief that the power was inherent?

Moreover, the statement of the court (p. 293) as to the existence of the power at common law is weakened by an inaccurate quotation from Lord Hale whose actual language does not extend the power beyond the limit of our concession. The sentence—

> When favorable or extenuating circumstances appear and when youths are convicted of their first offense—

does not appear in (1) the 1st Am. edition, (2) the London 1778 edition, or (3) the London 1800 edition—the only three editions available in the Library of Congress at Washington. Instead thereof we find the following:

> where he is not satisfied with the verdict or the evidence is uncertain, or the indictment is insufficient. (Hale, 2, p. 412, all three editions.)

The court also refers only to earlier New York decisions suited to its need. Of these, *People* v. *Whipple*, 9 Cow. 707, 715 (1827), one of the cases cited,

must be considered overruled by *People* v. *Morrisette*, 20 How. Pr. 118 (1860), which unequivocally declared (p. 119):

> *I am of the opinion the court does not possess the power to suspend sentence indefinitely in in any case. As I understand the law, it is the duty of the court, unless application be made for a new trial, or a motion in arrest of judgment be made* for some defect in the indictment, *to pronounce judgment upon every person convicted of crime* by a jury or who pleads guilty. An indefinite suspension of the sentence prescribed by law is a quasi pardon, provided the prisoner be discharged from imprisonment. No court in the State has any pardoning power. * * * Two of the justices of the supreme court, residing in this city, have informed me that they are not aware of any such statute, or of any authority for suspending sentence against criminals who have been found guilty by a jury or have pleaded guilty.

Although the *Morrisette* case was cited on the brief for respondent in the *Court of Sessions* case, the court elected to ignore it. It seemed to throw such doubt upon what the court in the latter case calls an undoubted power as, in 1893, to lead to a statutory enactment giving the power to the courts.

In *People* v. *Court of Sessions*, 66 Hun. 550,decided in 1893, the year previous to the principal *Court of Sessions* case under discussion, the Supreme Court of New York, affirming a decision of the same court at special term, held unequivocally that a court had

no discretion, after conviction, to suspend judgment during the good behavior of the defendant. There is in the 1894 case no reference to the Supreme Court decision, the reasoning of which is especially complete and convincing.

New York cases which have followed *People* v. *Court of Sessions, supra,* have invariably, so far as those cases have been examined, laid stress upon the fact that the power to suspend sentence was expressly granted by the legislature in 1893.

Weaver v. *People* (Mich.), *supra,* and *People* v. *Reilly,* 33 Mich. 260, both relied on, cited in the (1894) *Court of Sessions* case, must be considered as overruled by *People* v. *Brown,* 54 Mich. 15, and *People* v. *Felker,* 61 Mich. 110.

State v. *Addy* (N. J.), also relied on in the *Court of Sessions* case, does not announce any sweeping doctrine. Its holding may be summed up in the following paragraph from the opinion (p. 115):

> It would seem that it is stating the matter too broadly to assert that it is always the imperative duty of a court to render judgment upon a conviction of crime unless some legal proceeding for review be interposed. Considerations of public policy may induce the court to stay its hand.

The opinion in *Gehrmann* v. *Osborne* (N. J.) is hedged about by the repeated qualification that no power exists to suspend sentence *unless the defendant has consented* to the postponement. The court expressly concedes that either the prosecution or the defendant could insist upon sentence at any

time after a case was ripe for judgment. Whatever reasoning there is in the course of the long review of authorities appears to be based upon this condition. Either the court has the power or it has not. There is no holding in the *Gehrmann* case that such a power is "inherent" in any court. Moreover, many of the cases cited in support of the conclusion have either been overruled or are to be distinguished as not going to the length necessary to uphold even the limited position taken by the court.

Sylvester v. *State, supra,* cited by the New York court, holds simply that (p. 195)—

> It has long been a common practice in this Commonwealth, * * * when the court is satisfied that, *by reason of extenuating circumstances, or of the pendency of a question of law in a like case before a higher court, or other sufficient cause,* public justice does not require an immediate sentence, to order, *with the consent of the defendant and of the attorney for the Commonwealth,* * * * that the indictment be laid on file; *and this practice has been recognized by statute.*

Dowdican's Bail (Mass.) *supra,* and *St. Helaire, Petitioner* (Me.), *supra,* are to the like effect.

The *Crook* case (N. C.), *supra,* and the *Patrick* case (Cal.), *supra,* are disposed of by holding that after moving for suspension a defendant can not afterward complain thereof. In the *Crook* case, the court said:

> We search in vain for direct authority emanating from the courts of other States to aid us in determining the precise meaning of such orders [that the judgment be suspended], be-

> cause it has not been the practice to make them elsewhere in the same way. * * * *We can not understand how the rights of the defendant are infringed or his interest prejudiced by allowing him to escape for the present* upon a partial judgment for the costs and suspending the motion or prayer for further punishment instead of subjecting him immediately to such fine or imprisonment as his own criminal conduct has made him liable to suffer.

See also *Ex parte Wells*, 18 How. 315.

Ex parte Williams (1890), 26 Fla. 310, follows, without reasoning, *State* v. *Addy, supra*, and *Commonwealth* v. *Dowdican's Bail* (1874), 115 Mass. 133, in which it is said expressly that the practice "*has been recognized by statute.*"

In *St. Helaire*, Petitioner, *supra*, the court, making no attempt to establish the doctrine upon reason, based its decision upon *People* v. *Court of Sessions*, *State* v. *Addy*, *People* v. *Reilly*, *Sylvester* v. *State*, and *Commonwealth* v. *Dowdican's Bail*, all discussed *supra*.

In the *Dunleavy* case (Pa.), *supra*, the court held valid a sentence imposed at a succeeding term, on the ground that the prior term suspension order was not a judgment, and that the duty to pronounce a valid judgment could be performed at *any* term. To like effect see *Phillips* v. *State* (1911, Ark.), 140 S. W. 734. The court, in the *Dunleavy* case, said:

> We use these as illustrations to show how dangerous * * * it would be if the hands of the court were tied by a suspension of sentence such as was made in this case.

Of the cases holding *against* the power to capriciously suspend imposition we content ourselves with the following quotation from the *Flint* case, 25 Utah, 341 (*supra*):

> But we know of no rule or principle of law whereby a court can indefinitely suspend sentence, keep the defendant in a state of suspense and uncertainty, and, long after he has been discharged from custody, have him rearrested and impose a sentence of either fine or imprisonment on him. A suspension of sentence for an indefinite period is, in effect, an exercise of the functions of the pardoning power, which belong exclusively to the board of pardons. * * *

The two cases apparently holding for the power to capriciously suspend *execution* demand attention.

In the *White* case (N. C.), *supra*, the second or corrected sentence (for breach of the condition, on which the suspension order was put in the first sentence of five years) was for but one year. It was held without citation of authority, that the power to add to a sentence later in the same term, a proviso suspending execution, flowed from the general control over a judgment during the term of its rendition; that the defendant took the benefit of the suspension, and thereby assumed the burden of the cost-payment condition attached thereto; and that in any event, as the resentence was for a shorter term, defendant could not be heard to complain.

The present respondent relies especially on the Supreme Court of Ohio. *Weber* v. *State*, *supra*, in-

volved an unconditional suspension order on a plea vacated a little later at the *same* term. The convict attacked the vacating order and his imprisonment. No attempt is made to support the decision by reasoning, authority, or statute. Because short it is quoted:

> PER CURIAM: The power to stay the execution of a sentence, in whole or in part, in a criminal case is inherent in every court having final jurisdiction in such cases, unless otherwise provided by statute. The suspension, being in favor of the prisoner, is for his benefit, and is valid whether consented to by him or not. When the suspension is upon conditions expressed in the judgment, the prisoner has the right to rely upon such conditions, and so long as he complies therewith the suspension will stand. But when the suspension is without express conditions, as in this case, it is within the power of the court to set aside the suspension at any time during the same term, on its own motion, and to order the sentence to be executed. Cases cited by counsel are to the effect that the suspension may be set aside at a subsequent term; but this case does not require us to go to that extent, because here the suspension was set aside at the same term at which sentence was passed. Judgment affirmed. (58 Ohio St. 616, 619.)

Plainly, on the facts the *expression* as to inherent power in the absence of statutory prohibition is pure *dictum*, because if the suspension order was *void* the duty of the court to execute the sentence was un-

doubted, and if *valid* its power to change the judgment at the *same* term was equally undoubted. The material portions of the Ohio statutes then and now in effect are quoted in an appendix (A) hereto. They carry the strongest implication of a duty to promptly sentence and execute (save for specific exceptions not here material), and furnish a complete detail of procedure therefor. Of course, were it necessary or proper to resort to those statutes, their interpretation by the Ohio Supreme Court—if it had interpreted them—would be conclusive here. But resort thereto is here unnecessary, and if it were necessary that court has *not* adversely interpreted them.

The Ohio court can not *conclusively* establish for this court the inherent or common-law powers of courts generally.

In Wells on Jurisdiction of Courts the author says:

> However, that body of jurisprudence (the common law) may furnish these courts (Federal) with rules of procedure, definition, and construction. (Sec. 304, p. 303.)
>
> As to what is in general included within the common law, resort must of course be had to the English and American reports of decisions by the courts. (Sec. 208, p. 213.)

In *Smith* v. *Alabama*, 124 U. S. 465, 478–9, the court said:

> There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the

> language of the English common law, and are to be read in the light of its history. The code of constitutional and statutory construction which, therefore, is gradually formed by the judgments of this court, in the application of the Constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting on national authority. *Moore* v. *United States*, 91 U. S. 270.

See also *Ex parte Wells*, 18 How., 310, 311.

Seven years after the *Weber* case was decided and in December, 1905, the Court of Common Pleas—a court of original criminal jurisdiction in Ohio—in construing statutes then in effect, R. S. 7362 (See Appendix A to this brief) in *State* v. *Baker*, 3 Ohio N. P. Rep. N. S. 624, said:

> I conclude then that this court has authority to suspend execution of sentence *only temporarily*, * * * etc.

Of this section and case, the authors in 6 Page & Adams Anno. Ohio General Code, in a note, their section 13698, p. 644, say:

> This is the only section conferring power upon the Common Pleas Court to suspend its own sentence, and it provides merely for a temporary suspension *for the purpose of affording the defendant a reasonable opportunity to file his petition in error in the Circuit Court*, and there secure a suspension of the execution of his sentence *until that court disposes of his*

petition in error. (Citing the *Baker* case, *supra*, after having also in the same note referred to the *Weber* case, *supra*.)

In *Sterling* v. *Drake*, 29 Ohio State Rep. 457, 461—a case involving a governor's reprieve—that court classes reprieves at the common law as of three sorts: (1) Ex mandatio regis; (2) ex arbitrio judiciis; (3) ex necessitate legis—the latter comprehending pregnancy and insanity. The second was exercised by the courts as the representative of the King. On this subject it was said:

> From the above it will be seen that the power to reprieve persons under sentence of death was one of the prerogatives of the King himself, and the justices before whom the prisoner was tried, *acting in behalf of the King*, might either grant arbitrary reprieves or take them away even after the termination of their sessions. If *those acting in behalf of the King* by long usage had become authorized to thus grant or take away reprieves, it must be conclusively inferred that they were acting within the scope of the powers with which the sovereign *on whose behalf* they acted was clothed by virtue of this prerogative.

Of course it goes without saying that, though in England, where there was no division of the Government into branches, the court might act as the representative of the King, they may not in this country discharge functions exclusively confided to the executive branch of the Government. In thus tracing this power to the sovereign at the common law, the

Supreme Court of Ohio logically classifies it as a power apart from the judicial branch of the Government.

The statute, 5409 R. S., defining the offense to which Henehan plead guilty, requires that he "*shall be imprisoned not less than five years nor more than ten.*" Therefore the practical effect of the judge's order suspending execution of that sentence was to overrule the declared will of Congress and substitute his own decree for the law of the land. The bailiff of his court had at once as much authority, and as little power to take such action as had the judge himself.

V.

A FEDERAL DISTRICT COURT HAS NO POWER TO PERPETUATE A GIVEN TERM BEYOND THE STATUTORY TIME OF COMMENCEMENT OF ITS NEXT REGULAR TERM AT THE SAME PLACE.

This may be in a sense a moot question, for if the suspension order be void, commitment could issue at any term or in vacation; while, if valid, the defendant having accepted its benefits and breached its conditions, would not be heard to complain of after execution of the sentence. The portion of the order here involved reads:

> And for the purposes of this case this term of this court is kept open for five years.

The plain purpose of this order was to retain control over defendant's behavior in connection with the condition of suspension, to avoid the supposed application of the general rule so often laid down by

this court that judgments both civil and criminal, become final and pass beyond the control of a court after the expiration of the terms at which they are rendered. *United States* v. *Mayer*, 235 U. S. 67, 68, 69, and cases, and a possible further purpose was to bring it under "term control," within the meaning of a certain Ohio statute cited in the appendix to this brief.

Section 100 of the Judicial Code provides that terms of court shall be held "for the western division at Toledo on the last Tuesdays in April and October." So that during the five years in question at least nine other regular terms would automatically begin from time to time by force of the statute. Each of these might also be kept open for a like purpose in some other case; and if for five years, they could be kept open for forty years. Each term would have its own minutes and records and at the end of the period there would be a large number of different regular terms of the same single court in session at the same time and in the same place. This is utterly opposed to the very idea of a term; i. e., a periodical session spaced by vacations.

In *Bronson* v. *Schulten*, 104 U. S. 410, 415, this court said:

> In this country all courts have terms and vacations. The time of the commencement of every term, if there be a half a dozen a year, is fixed by statute, and the end of it by the final adjournment of the court for that term. This is the case with regard to all the courts of the United States. * * *

In *East Tennessee Co.* v. *Wiggin*, 68 Fed. 446, 447, Judge Lurton, speaking for the court, said:

> Unless sooner adjourned a term of the United States Circuit Court may extend from the beginning of one term *to the opening of the succeeding statutory term of said court.*

In *Jaques* v. *The Railroad Company*, 43 Conn. 32, 34, the court said:

> * * * The regular terms of the Superior Court are fixed by statute to commence at definite times, and all cases continued in the court go from one term to another in regular succession, which could not be done if one civil term could be carried into or beyond. another term of the same character. * * * And if there were no other objection it is manifest that great confusion would result from such a practice. If one term can thus be continued, so could all the terms in the county, and the result would be that many regular terms of the same court might be in existence at the same time in the same county, and it would be impossible to know to what term a case belonged. We are satisfied that one regular civil term of the court can not be continued after the time prescribed for the commencement of another regular civil term in the same county.

In *Harlan* v. *McGourin*, 218 U. S. 442, 450, this court held that the circuit court for the northern district of Alabama could continue its work during the entire period of the term fixed by statute *to tran-*

spire at that place although another statutory term had in the meantime begun *at another place in the district.*

This of course is an entirely different question from extending a term into its own successor term at the same place; and this court would not have suffered the particular term in question to have been continued into its own succeeding term by order or otherwise, as is manifest from the fact that in the opinion the *East Tennessee Co.* case, *supra,* is approvingly referred to.

Section 746, R. S., reading—

> When the trial or hearing of any cause, civil or criminal, in a circuit or district court, has been commenced and is in progress before a jury or the court, it shall not be stayed or discontinued by the arrival of the time fixed by law for another session of said court; and the court may proceed therein and bring it to a conclusion, in the same manner and with the same effect as if another stated term of the court had not intervened.

strongly indicates that Congress did not believe its created courts possessed the power to extend their *terms* beyond the statutory period.

The case of *Hume* v. *Bowie,* 148 U. S. 245, depended upon the authority given by section 770, R. S., to regulate the manner of taking appeals; and in *Bank* v. *Withers,* 6 Wheat. 106, it nowhere appears that the adjournment was to a time after the expiration of the statutory term.

The jurisdiction of *this* court was fully exploited in the brief filed for the Government in connection with the petition in this proceeding and needs no further consideration herein.

CONCLUSION.

It is respectfully submitted that the respondent, as judge of the District Court for the Northern District of Ohio, Western Division, should be commanded by this court to make and enter the order requiring forthwith the issuance of commitment and the enforcement of the execution of sentence in the case of James E. Henehan.

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AUGUST, 1915.